

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE WILLIAM H. ALSUP

JORGE SALHUANA,)
)
Plaintiff,)
)
VS.) NO. C 11-5386 WHA
)
DIAMOND FOODS, INC., et al,)
) San Francisco, California
Defendants.) Thursday
) March 1, 2012
) 2:00 p.m.

TRANSCRIPT OF PROCEEDINGS

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P R O C E E D I N G S

MARCH 1, 2012

2:09 p.m.

THE COURT: Now we go to Diamond Foods,
Inc. Securities Litigation.

THE CLERK: Civil Matter 11-5386.
Counsel, please state your appearance for the
record.

MS. BRETAN: Good afternoon. Jennifer Bretan of
Fenwick & West on behalf of Diamond Foods, Inc. With me is my
colleague Catherine Kevane.

MR. MARTIN: Good afternoon, your Honor. Robert
Martin for defendant Michael Mendez.

MS. IGRA: Good afternoon, your Honor. Naomi Igra
for defendant Michael Mendez.

MR. ROBBINS: Darren Robbins, your Honor, and Shawn
Williams on behalf of the New England Carpenters Pension and
Annuity Fund, lead plaintiff movants.

THE COURT: Thank you. And?

MR. BLEARS: Good afternoon, your Honor. Norm Blears
from Hogan Lovells on behalf of defendant Steven Neil.

THE COURT: All right. And?

MR. HEIMANN: Richard Heimann, your Honor, for
Mississippi.

MR. SABELLA: Jim Sabella also for Mississippi

1 Retirement.

2 **THE COURT:** What's your name?

3 **MR. SABELLA:** Jim Sabella.

4 **MR. HARNES:** John Harnes also for Mississippi.

5 **THE COURT:** What's your name?

6 **MR. HARNES:** Harnes, H-A-R-N-E-S.

7 **THE COURT:** All right, welcome. And?

8 **MR. NEVILLE:** I'm George Neville with the Mississippi
9 Attorney General's Office, your Honor.

10 And Martin Millette with the Mississippi Attorney
11 General's Office.

12 **THE COURT:** And?

13 **MR. WILLIAMS:** Your Honor, Sean Williams, Robbins,
14 Geller, Rudman and Dowd, on behalf of the Carpenters Fund.

15 **THE COURT:** Which fund?

16 **MR. WILLIAMS:** The Carpenters Fund. New England
17 Carpenters Fund.

18 **THE COURT:** I got it. Thank you.

19 Let's see. We're here for appointment of lead
20 plaintiff.

21 So how many applicants do we have today?

22 **MR. ROBBINS:** Just two, your Honor.

23 **THE COURT:** All right. And those are Mississippi
24 Public Employees Retirement System, that's one, right?

25 **MR. ROBBINS:** Yes, your Honor.

1 **THE COURT:** And who is the other one?

2 **MR. ROBBINS:** The New England Carpenters Pension and
3 Annuity Funds.

4 **THE COURT:** Okay. All right. So let's hear first
5 from New England.

6 **THE COURT REPORTER:** Counsel, your name one more
7 time, please?

8 **MR. ROBBINS:** Darren Robbins. And together with my
9 partner, your Honor, Sean Williams, we appear on behalf of New
10 England Carpenters.

11 First and foremost, my client Harry Dow, the
12 executive director of the firm, is here with us in the
13 courtroom. He traveled from Boston to attend this hearing.

14 **THE COURT:** Thank you for coming today.

15 **MR. ROBBINS:** Your Honor, his --

16 **THE COURT:** What is his name?

17 **MR. ROBBINS:** Harry Dow.

18 **THE COURT:** D-O-W?

19 **MR. ROBBINS:** D-O-W.

20 **THE COURT:** Okay.

21 **MR. ROBBINS:** This case presents a very
22 straightforward case of statutory interpretation. It deals
23 with two specific provisions in the lead plaintiff --
24 provisions of the PSLRA. And your Honor is well aware of them
25 having opined on this almost a half dozen times over the last

1 event or 15 years, including one of the first decisions in this
2 district on the interpretation of the overly litigious lead
3 plaintiff provision.

4 It's being juxtaposed here, your Honor, with another
5 provision, which is the most adequate plaintiff provision, both
6 of which appear in 15 U.S.C. 78u-4(a)(3) and I'll go on and on,
7 but basically there is subpart (6), your Honor, which is the
8 overly litigious plaintiff provision, and there is subpart (3),
9 which is the most adequate plaintiff provision. And the Court
10 is being asked to interpret the interaction between these
11 provisions.

12 Now, in November, 1999 Judge White, actually, about a
13 week or 10 days before your Honor issued an opinion in a case
14 called *McKesson*, and in that case, your Honor, there was a
15 movant, an institutional movant, much like Mississippi PERS
16 here. In that case it was the Florida State Board of
17 Administration, which had been -- which had triggered the
18 provision that we're talking about here, the overly litigious
19 plaintiff provision which bars lead plaintiff applicants from
20 being appointed more than five times in any three-year period.

21 However, it also provides the ability for Courts to
22 lift that bar -- and these are the key words, your Honor --
23 consistent with purposes of this section.

24 And in that situation the Florida Board had a loss of
25 \$180 million. That was \$130 million more than any other lead

1 plaintiff movant. And in that case Judge White was presented
2 with the notion that, wait a second. We have what appears to
3 be the most adequate plaintiff because its loss is dramatic,
4 180 million. Yet, Judge White found that because that entity
5 was in six cases -- here we know that Mississippi PERS
6 currently is involved in at least 12 and counting, overseeing
7 12 complex class actions at a minimum and having filed at least
8 one of those during the pendency of this motion.

9 In that case Judge White found there were no special
10 circumstances that would warrant lifting the presumptive bar
11 that was triggered by Florida having been in six cases in the
12 prior three years.

13 About 10 days later your Honor dealt with the same
14 issue in the case called *Network Associates*. And in that case
15 your Honor concluded that the City of Philadelphia Pension Fund
16 could, in fact, serve, notwithstanding the fact that it had
17 been in more than five cases in three years. And in concluding
18 that, your Honor, without a lot of analysis, your Honor pointed
19 to the conference committee report and said that the next best
20 thing to the statutory language is the -- is the -- is a
21 conference committee report showing Congressional intent. And
22 your Honor cited *Silicon Graphics*, which as you may recall was
23 the seminal decision in this area, which said exactly the same
24 thing.

25 Now, here is my point, your Honor. There are two

1 intervening decisions which dramatically alter the landscape
2 with respect to the lead plaintiff provisions. In two separate
3 situations since 1999 the Ninth Circuit has expressly opined in
4 the context of a mandamus on these lead plaintiff provisions.
5 Judge Kozinski in the seminal opinion of *Cavanaugh versus*
6 *Copper Mountain* 306 F.3d 726 at 732 admonished District Courts
7 to follow, and I quote Judge Kozinski, the straightforward
8 application of the statutory scheme, end quote.

9 Went on to say in that opinion, the Ninth Circuit
10 said, and I quote again: Courts may not depart from the
11 statutory text because they believe some other arrangement
12 would better serve the legislative goals; period, end quote.

13 Now, in the interim, about two years ago, another
14 lead plaintiff decision was taken up to the Ninth Circuit,
15 again on mandamus, dealing with one of these other six subparts
16 of the PSLRA lead plaintiff provisions. That case is *Cohen*
17 586 F.3d 703, and at 709 and 710 the Ninth Circuit repeatedly
18 said the statutory text controls, saying things like, quote,
19 ordinary reading of this clause, end quote.

20 The plain text of the statute, or going on to say
21 things like:

22 "When a statute speaks with clarity to an
23 issue, Courts must apply the clear meaning of
24 the statute."

25 The emphasis here, your Honor, is that the statutory

1 text should control, yet Mississippi PERS asked this Court to
2 basically leapfrog the conference committee report over the
3 statutory text. And this is not an ambiguity. This statute is
4 clear. In fact, the Ninth Circuit referred to these provisions
5 as mandates. These six subparts are mandates. They are not
6 some touchy-feely provision which judges are to think about and
7 maybe throw in the mix. The statute is clear, express and
8 unambiguous.

9 Now, what MPERS cites at Page 5 of its reply brief
10 says as follows:

11 "The presumptive bar should not operate
12 at cross purposes with the most adequate
13 plaintiff provision."

14 That's the conference committee report. What the
15 statute says is that:

16 "It should be interpreted consistent with
17 the purposes of this section."

18 Those are meaningful distinctions. And MPERS relies
19 heavily, repeatedly going back citing District Court decisions
20 of which there have been a dozen or so that don't really go
21 into the analysis of the interplay between the statutory text
22 and the conference committee report.

23 So what are the purposes of this section? Because
24 that's the statutory text. And your Honor dealt with this.
25 And no other Court has really delved into this. Five different

1 times in your Honor's opinion in 1999 you referred to the
2 appointment of institutional investors as being one of the most
3 important functions of the lead plaintiff provisions of the
4 PSLRA, five different times in that decision.

5 You also went on to say that, and you used the
6 following words, "manage, control and monitor." In other
7 words, the whole -- the whole purpose behind this statute was
8 to create a litigation scheme whereby the plaintiff would act
9 like a traditional litigant and not be captured by lawyers so
10 that lawyers were making decisions as opposed to the plaintiff
11 themselves.

12 And here, as your Honor probably notes, not a single
13 place in that questionnaire that was submitted to your Honor is
14 there any testimony, there is not one bit of evidence in the
15 record from the fiduciaries at the Mississippi fund. In fact,
16 if you look through there, everything comes from lawyers.

17 Now, some of it is from the lawyers to the Fund --
18 that is, the Attorney General's Office, but none from the
19 fiduciaries. It's a big point. Plaintiff versus counsel.

20 One of the other important purposes of the section
21 manifested in the statutory text was subpart (6), which says
22 the statute is designed to avoid repeat litigants, right in the
23 statute. So what MPERS characterizes as aspirational or
24 considerations are, in fact, mandates; that is, the mandate of
25 the statute as interpreted by the Ninth Circuit is that a

1 litigant who has been appointed five times in three years is
2 presumptively barred and only where that litigant has made an
3 evidentiary record of what Judge White called special
4 circumstances can the bar be lifted.

5 Now, it is true that MPERS would like the statute to
6 read that the presumptive bar doesn't apply if you have really
7 large losses, but that's not what Congress said, and the mere
8 fact that that would be convenient for MPERS doesn't make it
9 so. So the issue becomes: Have they made an evidentiary
10 showing of the special circumstances warranting lifting of the
11 presumptive bar? And I think the answer here is a resounding
12 no. Actually, quite the opposite.

13 Your Honor has seen in the questionnaire that they
14 are again involved in at least a dozen cases. Some of those
15 cases, your Honor, are years old. They have gone to the
16 Supreme Court, fifth amended complaint, discovery cut-off.
17 Cases like *Merck* involving \$6 billion in damage, dozens of
18 defendants. These are complex cases and they certainly are not
19 someone where maybe they had been appointed five times in three
20 years, but have no litigation load. In fact, they have a
21 massive litigation load.

22 **THE COURT:** Be more precise on what is Mississippi
23 PERS' current caseload as a lead plaintiff?

24 **MR. ROBBINS:** Its current caseload, your Honor --

25 **THE COURT:** As a lead plaintiff.

1 **MR. ROBBINS:** As a lead plaintiff, I believe, is 11
2 cases and one more as a class representative. But as a lead
3 plaintiff, the direct answer to your question is 11.

4 Those cases involve a massive litigation that went to
5 the Supreme Court in *Merck*. They involve a case involving
6 JPMorgan arising out of about \$20 billion worth of MBS
7 securities. A *Sharing Plough* case in New Jersey, the District
8 Court in New Jersey. A 230 page, 588 paragraph complaint with,
9 like, 300 docket entries. I mean, these are not -- as your
10 Honor knows, having overseen these, these are not simple
11 litigations.

12 **THE COURT:** Is the five in three years, does that
13 mean five that have commenced in the last three years or
14 regardless of when the case commenced five representations as
15 lead plaintiff in the last three years?

16 **MR. ROBBINS:** What it means, your Honor, is that the
17 presumptive bar is triggered if they have been appointed within
18 five in the last three years. However, there are scenarios, of
19 course, where somebody had been appointed five in the last
20 three years, but none of them are ongoing. So that might be
21 the type of circumstance that would militate in favor of
22 lifting the bar.

23 **THE COURT:** How many of these 11 were in the last
24 three years?

25 **MR. ROBBINS:** I believe it is eight or nine.

1 **THE COURT:** So, all right. So you're saying that
2 eight or nine times in the last three years Mississippi PERS
3 has been appointed as lead counsel in some securities case?

4 **MR. ROBBINS:** Correct. Thereby triggering the
5 provisions of subpart (6). So now they are in a position to
6 provide the Court with evidence that would warrant lifting the
7 bar.

8 And what Judge White said in the *McKesson* decision
9 was: What are the circumstances that would warrant lifting the
10 bar if somebody has triggered this? In that case Florida had
11 been appointed in only six cases. Here it's significantly
12 more. And Judge White said, Here is a scenario in which it
13 would warrant lifting the bar. What about if they had been
14 involved in eight actions in the last three years, but there is
15 no other movant? Should the class suffer because that?
16 Absolutely not. That would be one of the special
17 circumstances.

18 Or how about, your Honor, given the importance, as
19 you articulated in your *Network Associates* decision, that all
20 the other movants were individuals. Judge White said that
21 might warrant lifting the presumptive bar. That might
22 constitute special circumstances.

23 Or how about if you had someone, your Honor, who had
24 been appointed seven times in the last three years, but another
25 movant had been appointed 20 times. That might warrant it.

1 But those are the special circumstances that warrant lifting
2 the bar. They have shown none.

3 In fact, your Honor, if you look at question nine of
4 the questionnaire that was submitted, it took no less than
5 nine, nine lawyers to respond to a simple questionnaire. Look
6 at all the lawyers in the room. You know, for my partner,
7 Shawn Williams, it was a \$10 cab ride to get here. For me to
8 get here it was a \$200 airfare from San Diego. All these
9 lawyers have flown for one simple hearing. I think it
10 highlights that, in fact, lawyers are driving this as to
11 Mississippi PERS.

12 Some of them state employees, no doubt, but they are
13 not fiduciaries at the fund. There is no executive director.
14 There is no trustee from the fund who has testified here to
15 provide evidence necessary to warrant lifting the bar.

16 **THE COURT:** What's the story on New England? Does
17 New England have -- has your side been appointed to be lead
18 plaintiff in the last three years?

19 **MR. ROBBINS:** Yes, your Honor.

20 **THE COURT:** How many times is that?

21 **MR. ROBBINS:** Twice.

22 **THE COURT:** Okay. So you're not up to five yet.
23 This would be number three, is that what you are saying?

24 **MR. ROBBINS:** Correct, your Honor. That would not
25 trigger the bar.

1 **THE COURT:** Do you have other applications pending?

2 **MR. ROBBINS:** No, your Honor.

3 **THE COURT:** All right. Go ahead.

4 **MR. ROBBINS:** So one of the things that also
5 militates -- and, again, there has been no affirmative showing
6 which is required by MPERS, but one thing that illustrates how
7 spread out they are is, in fact, in submitting their
8 certification, they missed a case. Now, they say in their
9 brief -- their reply, it wasn't really missed. We kind of
10 mischaracterized it and they were consolidated, but nonetheless
11 it wasn't in there.

12 And then we see in the questionnaire they submitted
13 that they put a certification in which missed some of their
14 trades. So they have some trades in their certification that
15 are different than their trades in the questionnaire. And I
16 think it's just illustrative that when you take on a dozen
17 major class action litigations involving tens or maybe even
18 more than \$100 billion worth of losses, that sometimes you get
19 spread a little too thin, and that's the case here.

20 So it's not as if my client has to show that they are
21 spread too thin. They have the burden and they made no showing
22 at all.

23 And it's interesting. One of the things that they
24 say, your Honor, the arguments they give is that they cite a
25 judge here in this Court, Judge Chesney. And they say, Judge

1 Chesney dealt with this issue. This is -- this is silly. You
2 you shouldn't not lift the bar for them. And Judge Chesney
3 said that:

4 "The PSLRA as set forth in the conference
5 report indicates that the provision should be
6 narrowly applied with respect to
7 institutional investors."

8 And they said basically whenever you have a large
9 loss and you're an institution, the bar should be lifted.
10 Essentially the exception swallows the rule. But you know what
11 Judge Chesney cited in opining in the *Sirf* case -- that's
12 S-I-R-F -- and I read as follows, which I find quite
13 interesting:

14 "As a result, the conference committee
15 grants Courts discretion to avoid the
16 unintended consequence of disqualifying
17 institutional investors."

18 Read that again.

19 "The conference committee grants courts
20 discretion."

21 Conference committees, obviously, don't grant
22 anything. Statutes grant authority, and that was the basis
23 upon which Judge Chesney concluded that the presumptive bar
24 should be lifted simply because somebody had larger losses than
25 another.

1 And I think that really kind of summarizes our
2 arguments, your Honor. I would be glad to address any
3 questions or respond to the other side if you would like me to.

4 **THE COURT:** I do have a question that looks ahead a
5 bit. Maybe this has already been answered, but whoever gets
6 this job has to go out and interview and try to get the best
7 deal on the lawyers.

8 Now, has your New England already got an inside deal
9 with your firm? Is New England willing to do a fair appraisal
10 of other candidate law firms?

11 **MR. ROBBINS:** Your Honor, my client is well aware of
12 your prior orders and your concern about lead plaintiff
13 involvement. Not only did he just come today, but, in fact,
14 asked for and received the names of lawyers in this litigation
15 presumably with some background and experience in this case.
16 So has asked for that already. That's in his possession before
17 even being appointed.

18 So he does understand and has indicated that, in
19 fact, he intends to speak with other --

20 **THE COURT:** I have found in many of these class
21 actions -- almost every one of them, in fact -- that the lead
22 plaintiff will negotiate a good deal that will be far less than
23 the standard rates going. In *Network Associates* the
24 plaintiff's law firm agreed to an eight percent fee. That was
25 Mr. Heimann's firm. They got one of the best results, in my

1 judgment, in securities law's history. And the class got the
2 benefit of that because the lawyers only got eight percent.

3 And I think this -- this is what the lead plaintiff
4 owes to the class. This business of the lawyers being in bed
5 with the lead plaintiff and scratching each other's back, I
6 don't like that. I want the class to get the benefit.

7 **MR. ROBBINS:** First and foremost is maximizing the
8 net recovery to the class.

9 **THE COURT:** Correct, including attorney's fees.

10 **MR. ROBBINS:** That is the biggest expense to the
11 class.

12 **THE COURT:** On the other hand, you don't want to go
13 out and hire a cheap lawyer who is not going to do a good job.
14 I see both sides of that. But there's -- I'm telling you, they
15 have done a great job in getting good deals with lawyers who
16 have done an excellent job and at the same time the lawyers
17 have taken a hair cut and still made out like bandits, too, I'm
18 sure. You know what I mean.

19 All right. Well, I understand. So you're saying
20 that your New England is all okay with that.

21 **MR. ROBBINS:** Yes, your Honor.

22 **THE COURT:** All right. Let's hear from Mississippi
23 PERS.

24 **MR. ROBBINS:** Thank you, your Honor.

25 **THE COURT REPORTER:** Counsel, your name again,

1 please?

2 **MR. SABELLA:** Yes. Jim Sabella from Mississippi.

3 During Mr. Robbins' argument it seems to me he kind
4 of reversed the overall scheme of the PSLRA. The professional
5 plaintiff bar that he talked about is there, but the overriding
6 presumption of the PSLRA is that the entity, the lead
7 plaintiff, movant with the largest losses presumptively is the
8 most active plaintiff.

9 In this case Mississippi's losses are seven times
10 greater than New England Carpenter.

11 **THE COURT:** So what do you say to the fact that
12 you've got more than five times in three years?

13 **MR. SABELLA:** Right. And, of course, that provision
14 in the statute says that the Court may rule -- may accept as
15 the Court permits otherwise. So there is no question the Court
16 has discretion to do --

17 **THE COURT:** Well, how about these two decisions in
18 the Ninth Circuit, *Copper Mountain* and the other one?

19 **MR. SABELLA:** The statute itself says that the Court
20 may order otherwise.

21 **THE COURT:** I understand that. But what do you say
22 to the Ninth Circuit decisions?

23 **MR. SABELLA:** The Ninth Circuit decision simply says
24 you have to follow the statutory language, and the statutory
25 language has the professional plaintiff bar, but the Court may

1 order otherwise. And Courts traditionally in the case of
2 institutional investors do order otherwise.

3 Now, he cites one or two cases -- one case in this
4 district, where they invoke the professional plaintiff bar
5 against an institutional investor.

6 But I would submit to your Honor this is not that
7 kind of case, and let me explain why. I think Mr. Robbins
8 misstated the role of the Mississippi Attorney General in
9 supervising and handling litigation for the Pension Retirement
10 System.

11 And Mr. Neville is here. He can address it. But by
12 statute, the Mississippi Attorney General manages and monitors
13 and supervises all litigation on behalf of the retirement
14 system. And so what you have are the resources of the Attorney
15 General. They have got over 100 lawyers. Mr. Neville's spends
16 a substantial portion of his time. And also Mr. Millette,
17 who's here, is a member of that team.

18 So there is an enormous network of lawyers at the
19 Attorney General's Office to whom outside counsel have to
20 report. Mr. Neville is a hands-on monitor and supervisor of
21 litigation. He meets with us regularly. He attends
22 mediations. He reads drafts of the briefs, as do the members
23 of his staff.

24 So this is a situation where not only is there
25 sufficient manpower for the Attorney General to manage and

1 monitor outside litigation. This is perhaps the paradigm
2 situation where the outside counsel have a strict leash because
3 the Attorney General's Office has so much manpower.

4 **THE COURT:** Perhaps, but you didn't even list the
5 name of the real fiduciary at Mississippi PERS. Who is that?
6 There must be somebody in charge of Mississippi PERS?

7 **MR. SABELLA:** Well, and Mr. Neville can address how
8 he relates to the client. We have to report to the Attorney
9 General.

10 **THE COURT:** You don't even know who the client is.
11 You don't even know the name of the person at Mississippi PERS.

12 **MR. SABELLA:** We report to the Attorney General --

13 **THE COURT:** Yeah.

14 **MR. SABELLA:** (Continuing) -- who is essentially the
15 in-house lawyers for Mississippi PERS. I mean, that's the way
16 our reporting responsibility works.

17 **THE COURT:** That's good. It's all good that they
18 have those lawyers working for them, but at the end of the day
19 the lawyers are not supposed to make the decision.

20 Whenever the Mississippi Attorney General settles a
21 case, they can't just do it on their own. They have got to go
22 and talk to the head of the agency and say -- or the governor
23 or whoever and say, "We recommend you settle the case. Do you
24 agree?" And the governor or the head of the agency just says
25 "yes" or "no." It's an executive decision. It's not a

1 lawyer's decision.

2 **MR. SABELLA:** By statute -- can I have Mr. Neville
3 address that?

4 **MR. NEVILLE:** That's not actually the case in the
5 State of Mississippi. The Attorney General is vested through
6 the constitutional powers that actually initiate --

7 **THE COURT:** Why then doesn't the Attorney General run
8 the -- do you make the investment decisions?

9 **MR. NEVILLE:** Oh, no, sir. And those are actually
10 not made by the retirement system themselves either. They have
11 staff that they hire --

12 **THE COURT:** Is PERS just some kind of shell and the
13 lawyers do that and the outside consultants do the rest? What
14 do they -- there must be a head of PERS.

15 **MR. NEVILLE:** Certainly.

16 **THE COURT:** What is that person's name?

17 **MR. NEVILLE:** Her name is Pat -- I'm terrible with
18 names.

19 **THE COURT:** See, there you are. You can't even
20 remember.

21 **MR. NEVILLE:** I'm terrible with names, your Honor.
22 I deal mostly with Laura Tingle, who is the investment advisor.
23 And the relationship between any state agency and the Attorney
24 General's Office of the State of Mississippi is that we
25 represent them on behalf of the state. They are an arm of the

1 state. But ultimately when it comes to litigation, whether to
2 initiate litigation or to settle litigation or take it to
3 trial, is ultimately decided by the Attorney General. Perhaps
4 that's unique --

5 **THE COURT:** What does ultimately? Is there a
6 statute -- I mean, you're telling me -- I want you to use the
7 right words here. You're saying there is a statute in the
8 State of Mississippi that says the Attorney General has the
9 authority to settle lawsuits brought on behalf of Mississippi
10 PERS?

11 **MR. NEVILLE:** It's true for all state cases, not
12 just --

13 **THE COURT:** Where can I find that provision of the
14 Mississippi Code?

15 **MR. NEVILLE:** I don't know the cite right offhand,
16 your Honor.

17 **THE COURT:** You can submit it to me right after the
18 hearing.

19 **MR. NEVILLE:** Yes, your Honor.

20 **THE COURT:** I would like to read that language and
21 see, because that could be. It could be that that's the way it
22 works there.

23 But ordinarily the way it would work is that the
24 executive decision to settle a case still resides in the
25 executive with, of course, the advice and counsel of the

1 lawyer. But that the executive makes that decision.

2 But it's conceivable that you can set it up so that
3 the lawyers always make those decisions. Fine, but I would
4 like to see that.

5 And I want you to know. This is one of the issues
6 that I came into this hearing worried about, is that it looks
7 lawyer-driven as opposed to an executive somewhere in the
8 background saying, "What's the best for our fund?" So it would
9 be useful to see that statutory authority.

10 All right. So try to get that to me by tomorrow?
11 Can you do that?

12 **MR. NEVILLE:** Yes, your Honor.

13 **THE COURT:** Very well. Thank you.

14 Continue with your argument.

15 **MR. SABELLA:** If I could continue. *Back* against
16 *Amedisys* and *Ironworkers* --

17 **THE COURT:** Now you have gotten more -- now you've
18 got eight or nine. Back then you only had six or eight -- six
19 or seven. It keeps going up and up and up. At some point that
20 argument has got to stop.

21 **MR. SABELLA:** Actually, your Honor, what's
22 interesting about this is -- first of all, the actual number,
23 I believe, is six in the last three years, but -- which is
24 still more than five, but it's not eight or nine.

25 **THE COURT:** No, no, but that would make a difference

1 to me. I would like to know the precise number.

2 **MR. SABELLA:** In the certification that we filed we
3 identified six cases in the last three years.

4 **THE COURT:** Was it accurate?

5 **MR. SABELLA:** I believe it was. There's a dispute
6 over a seventh case, which was consolidated with an earlier
7 filed case and the appointment was in the earlier filed case.
8 So whether or not that's considered within the period or not,
9 you know, is open to, I guess, interpretation.

10 But in both of the two cases that I cited, Judge
11 Rykoff in the New York case and Judge Jackson in the Louisiana
12 case, the Courts specifically found there was no merit to the
13 "spread too thin" argument and that the accumulated experience
14 of Mississippi in multiple cases seems a benefit more than a
15 detriment.

16 And I would underscore that here because as we
17 mentioned in our brief, all during this period Mississippi has
18 had multiple cases, yet, they have achieved settlements of
19 100 million, 200 million, \$300 million in cases during this
20 period.

21 By contrast, I would suggest to your Honor, New
22 England Carpenters list in their certification or their answer
23 to the questionnaire two cases. They settled one for 9 million
24 and one for 12 million. They've virtually no experience in the
25 magnitude of the case that we're involved with here.

1 Mississippi routinely through the Attorney General's
2 Office can manage and monitor cases, multiple cases like this
3 and obtain hundred million dollar results for the class. And
4 after all at the end of the day what we're trying to do is get
5 the best recovery for the class. And I would submit to your
6 Honor the track record of Mississippi, notwithstanding that at
7 any point in time they may have six, seven, eight, nine cases
8 is extraordinary, maybe the best in the country and
9 certainly --

10 **THE COURT:** You have to judge that against the amount
11 of money that was requested. Though \$100 million sounds like a
12 lot, but if \$100 billion was being requested, that's not so
13 great.

14 **MR. SABELLA:** The point is, your Honor, they were big
15 cases that required a lot of supervision and a lot of
16 depositions and mediations and experts and all the things that
17 go into big cases and Mississippi knows how to handle a case
18 like that.

19 I would also suggest to your Honor, if your Honor is
20 worried about lawyer-driven litigation, which I understand to
21 mean outside counsel-driven litigation, New England Carpenters
22 is a one-man shop. They have Mr. Dow and he's the only person
23 they mention in their certification. So he has to run the --
24 the pension system. In addition, he has to supervise counsel,
25 and he also spends part of his time running a bank.

1 I would suggest to your Honor that if you're worried
2 about lawyer-driven litigation, New England Carpenters, which
3 doesn't have experience in big cases, is not in a position to
4 monitor Mr. Robbins' firm or whoever else would be appointed,
5 whereas the numerous lawyers at the Attorney General's office
6 routinely can monitor outside counsel. It's what they do.
7 They litigate for a living.

8 **THE COURT:** Do you -- that's a fair point. In any of
9 those other cases does the Mississippi Attorney General's
10 Office ask for attorney's fees?

11 **MR. SABELLA:** For themselves?

12 **THE COURT:** Yes.

13 **MR. SABELLA:** Not that I know of.

14 **THE COURT:** So when the settlement comes and -- is
15 there any part of that money that goes to the Mississippi
16 A.G.'s office?

17 **MR. SABELLA:** Not that I know of.

18 **THE COURT:** Does it go to the treasury or does it
19 just go back to PERS? Let's see what counsel says.

20 **MR. NEVILLE:** I hate to keep interrupting, but I feel
21 like these questions are something that...

22 The PSLRA allows for the person who actually is doing
23 the hands-on work as lead plaintiff to ask for reimbursement of
24 their time, and we have been awarded that in most of the cases
25 we have. We're talking about, you know, \$5,000, \$20,000.

1 **THE COURT:** How much?

2 **MR. NEVILLE:** \$5,000 or \$20,000 total for the time
3 that we spent.

4 **THE COURT:** Out of \$100 million settlement?

5 **MR. NEVILLE:** Yes. Yes, your Honor.

6 **MR. SABELLA:** Those are, I think, the incentive fees
7 that the lead plaintiff can ask for.

8 **THE COURT:** That's a whole different subject, which
9 we won't get into right now.

10 **MR. SABELLA:** Good.

11 Another point I'd like to make. Mr. Robbins argues
12 that, well, one of the special circumstances that he thinks is
13 necessary in order to override the professional plaintiff bar
14 is that maybe the next in line is an individual. So you would
15 let the institution do it.

16 But we cite in our brief numerous cases, including at
17 least two cases in this district, where the next in line was
18 another institutional investor. But nevertheless the Court
19 refused -- refused to invoke the professional plaintiff bar and
20 allowed the plaintiff, the institution that had more than five
21 appointments, to continue.

22 And those cases were Judge Chesney's case in *Sirf*
23 and, also, Judge Walker's case called *Casden*. In both of those
24 you had a lead plaintiff institutional movant with more than
25 five. You had other institutional investors waiting in the

1 wings to take over, but they didn't invoke the professional
2 plaintiff bar because they found the institutional investor was
3 certainly capable of handling the job and there was no reason
4 to override the overall presumption that the person with the
5 greatest losses should come next -- should come first.

6 Your Honor, if there is any concern whatsoever about
7 the resources of the Attorney General's office to monitor
8 outside litigation, I think they are put to rest by
9 Mr. Millette's declaration that he submitted in this case. He
10 goes through the staffing of the Attorney General's Office and
11 the participation that they have in cases, detail the
12 participation.

13 It's noteworthy if you look at the questionnaire
14 response from New England, they don't talk about what their man
15 does in cases. Mr. Neville attends mediations. He attends
16 trials. He attends depositions. He reads drafts of briefs.
17 The New England's questionnaire is silent about all that.
18 Their man isn't a lawyer. Their man is literally spread too
19 thin because he seems to be from their questionnaire a one-man
20 operation.

21 So if there is any concern here about adequate
22 supervision of outside counsel to make sure they don't get off
23 the reservation, I can assure your Honor from my past
24 experiences and from the written decisions other judges have
25 issued that Mississippi is the plaintiff that stays most

1 closely on top of outside counsel, and your Honor can't really
2 have any confidence at all that New England could do the same
3 thing.

4 **THE COURT:** What do you think about my views that if
5 Mississippi PERS is selected, that Mississippi PERS ought to
6 interview various law firms, take into account their track
7 records and get the overall best deal for the class rather than
8 just go with whoever happens to be representing them now?

9 **MR. SABELLA:** I suspect that's what Mississippi would
10 do. We don't have any fee arrangement in place with respect to
11 Mississippi. Mississippi has a list of, I believe, 13 law
12 firms that they deal with and they routinely will talk to a
13 large number of those firms about any particular case.

14 And I would like to point out the following --

15 **THE COURT:** Why limit it to 13? Why wouldn't you
16 want to -- someone who is very good may come forward with an
17 excellent fee arrangement, or that they may have done a case
18 exactly like this one in the past and they may give more value
19 to the class than somebody on your list of 13.

20 **MR. SABELLA:** How Mississippi has created that list
21 of 13 is basically the 13 top securities law firms in the
22 country, people they have worked with successfully in other
23 cases, who they know them personally, they know their
24 reputations.

25 I'm not saying they wouldn't go outside that list,

1 but this is a list of people that they know can handle the job
2 because they vetted them previously.

3 What I wanted to mention to your Honor, when your
4 Honor expressed his concern about fee percentages. My
5 understanding from looking at the reported cases is that in the
6 cases where New England has been the lead plaintiff the kind of
7 fee arrangements they have negotiated have been 24 and
8 25 percent.

9 Now, maybe Mr. Robbins can tell me I'm wrong, but I
10 believe that's been the case, which suggest to me that New
11 England doesn't bargain very hard with their outside counsel.

12 **THE COURT:** How about Mississippi PERS?

13 **MR. SABELLA:** Traditionally it's in the teens.
14 Traditionally it's in the teens. So a big difference.

15 Mississippi, I can tell you from personal experience,
16 is pretty tough on negotiating fees. It does not appear to me,
17 at least from what's available in the public record, that New
18 England is equally, shall we say, aggressive in terms of
19 negotiating with their outside counsel, but maybe Mr. Robbins
20 can address that.

21 **THE COURT:** All right. I need to bring it to a close
22 and let the other side have a brief reply.

23 **MR. SABELLA:** Thank you, your Honor.

24 **MR. ROBBINS:** Your Honor, may I show you just one
25 chart before we close?

1 **THE COURT:** Of course.

2 **MR. ROBBINS:** If I can address from the documentation
3 that was given to the Court in the questionnaire, Mr. Millette
4 put in a declaration before the Court and I'll address this
5 issue in a second, but this is directly responsive to the
6 Court's question about the ultimate decision making authority.

7 **THE COURT:** Your colleague is making so much noise
8 over there I can't hear you. Let him go ahead and open up the
9 surprise package.

10 **MR. ROBBINS:** Nothing like a surprise at the end of a
11 long day in court.

12 (Brief pause.)

13 **MR. ROBBINS:** It's just that when, when Mr. Sabella
14 was talking --

15 **THE COURT:** Is this the way it would work at trial if
16 we were to appoint you as the lawyer? We would have this?

17 **MR. WILLIAMS:** It's my job today, your Honor.

18 **THE COURT:** Okay.

19 (Chart displayed)

20 **MR. ROBBINS:** I just think this highlights, you heard
21 during the argument that there is a, quote, enormous network of
22 lawyers, end quote, appearing on behalf of MPERS, and you see
23 them in the courtroom. And this is the decision making
24 structure, with the Court and the -- and MPERS itself at the
25 two extremes and in the middle are no less than 14 different

1 lawyers.

2 Mr. Millette's declaration, I cite to Paragraph 11,
3 says as follows. Now, the Court has asked in the
4 questionnaire -- sorry has stated:

5 "No settlement will be approved by the
6 Court without the lead plaintiff's careful
7 recommendation in favor of it."

8 Emphasizing again the importance of the class member
9 as opposed to the lawyer.

10 Mr. Millette's declaration at Paragraph 11 says the
11 following, which is the Court's concern, I think, highlighting
12 the Court's concern:

13 "The ultimate decision regarding whether
14 to settle the litigation or proceed to trial
15 will be made by the Attorney General's
16 Office."

17 Now, I take grave exception to the disparagement of
18 my client, your Honor, Mr. Dow. It is true that he is an
19 executive director and he oversees the funds, but I can assure
20 you of this. Before this litigation was brought, it wasn't
21 some lawyer who decided it would be brought. That board of
22 trustees voted on this. So he is not there by himself. The
23 actual fiduciaries have considered this and have decided that
24 they would participate in this litigation.

25 And this notion, your Honor, that the New England

1 Carpenters have no experience, in fact, there have been only
2 three decisions since the enactment of the PSLRA at the
3 appellate level in favor of plaintiffs. One of those was
4 obtained after class certification was denied and the New
5 England Carpenters fought that case up to the Fifth Circuit,
6 which is not known as a bastion of liberalism, and were able to
7 prevail with Justice O'Connor sitting by special designation in
8 reversing that decision. And so the fact is in that case after
9 doing that, they were able to obtain a recovery 10 times larger
10 than what was being offered before, \$55 million.

11 The New England carpenters also participated as class
12 representatives in a case involving Flemming, which recovered
13 \$93 million. And your Honor actually hit the nail on the head.
14 I was waiting for this. You're being told 100 million,
15 200 million said, "Yeah, that's great." If you've got the
16 numerator, what's the denominator? Well, in fact, what you
17 weren't told is in the biggest recovery obtained by MPERS,
18 that's \$350 million. That sounds like a lot of money. Do you
19 know what the damages were? Their own lawyers told what the
20 damages were. 7.7 billion.

21 So I would say, your Honor, it's not something you
22 want to write home to mom about getting a four percent
23 recovery. That's not something that my client will stand for,
24 and it's not something to be very proud about either, I don't
25 think.

1 So with that, your Honor, I think I've addressed, you
2 know, the fact is that in the case of New England Carpenters,
3 there are real fiduciaries making real decisions overseeing
4 lawyers and there has been no showing in this case that would
5 warrant lifting the presumptive bar. None of the special
6 circumstances that have been recognized by Courts.

7 And simply relying on Judge Chesney's decision, which
8 cited the conference committee report, over the statute, a
9 conference committee report which says, "The conference
10 committee grants the authority to judges," is not -- is not
11 appropriate and is not compelling.

12 **THE COURT:** Thank you.

13 All right. Thank you.

14 **MR. SABELLA:** Your Honor, could I have one minute?
15 Thirty seconds?

16 **THE COURT:** Thirty seconds.

17 **MR. SABELLA:** Thirty seconds. In all the cases that
18 Mr. Robbins just mentioned where he says there was a
19 \$90 million recovery or case went to the Fifth Circuit, his
20 client was a -- one of the named class representatives. They
21 weren't the lead. So they weren't in charge of those cases.

22 **THE COURT:** Thank you.

23 All right. Two things to follow up with. It could
24 matter to me whether it's six or eight or nine appointments
25 within the last three years. So I want to -- by Monday at noon

1 I want you to each submit a new declaration under oath that is
2 very precise on that point and identifies -- so that we're not
3 guessing at it. All right?

4 So each side can -- the point that I'm interested in
5 is how many times has MPERS been appointed as lead counsel in
6 the last three years? All right? And then -- and then beyond
7 that, how many other cases do they have on their plate? But
8 those are two different points.

9 Second thing is, this is just for Mississippi -- or
10 both sides can present, and that is: I would like to see the
11 Mississippi Code Section whereby the law gives the Attorney
12 General the responsibility and authority to bring and decide
13 and settle cases on behalf of Mississippi PERS. Of course, I
14 have no doubt that they are authorized to litigate on their
15 behalf. That's not what I'm interested in.

16 What was represented to me was that they have the
17 executive authority to settle a case without even consulting
18 Mississippi PERS.

19 So that strikes me as a remarkable proposition, but
20 it could be true and I would like to see that. Both sides
21 can submit something -- all of this is due by Monday at noon.
22 Unless you tell me you can't do it. I will give you more time
23 if you need it. Do you want more time or not?

24 **MR. SABELLA:** No, your Honor. I'll do it.

25 **MR. ROBBINS:** No.

1 **THE COURT:** Okay. It will be under submission.
2 (Whereupon, further proceedings in the
3 above matter were adjourned.)
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CERTIFICATE OF REPORTER

I, DEBRA L. PAS, Official Reporter for the United States Court, Northern District of California, hereby certify that the foregoing proceedings in C 11-5386 WHA, JORGE SALHUANA vs DIAMOND FOODS, INC. were reported by me, a certified shorthand reporter, and were thereafter transcribed under my direction into typewriting; that the foregoing is a full, complete and true record of said proceedings as bound by me at the time of filing.

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/s/ Debra L. Pas

Debra L. Pas, CSR 11916, CRR, RMR, RPR

Tuesday, March 6, 2012